UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KARYN BROBYSKOV, Plaintiff, v. CAROLYN W. COLVIN, Acting Commissioner of Social Security, Defendant.	CASE NO. C14-1552-RAJ ORDER RE: SOCIAL SECURITY DISABILITY APPEAL

Plaintiff Karyn Brobyskov proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied Plaintiff's application for Disability Insurance Benefits (DIB) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, this matter is REVERSED and REMANDED for further proceedings.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1959.[1] She completed high school and one year of

[1] Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic

college. (AR 377.) She has worked as a waitress, an automotive accessories salesperson, a flagger, and an industrial cleaner. (AR 20, 526.)

Plaintiff applied for DIB and Supplemental Security Income (SSI) on September 14, 2010. (AR 232-44.) The applications were denied. (AR 65-76, 77-88.) Upon reconsideration, Plaintiff was granted SSI with an onset date established as September 14, 2010, which was her filing date. (AR 130.) But, because her date of last insured (DLI) was December 31, 2009, her DIB was again denied. (AR 102-109.) Plaintiff timely requested a hearing. (AR 167-68.)

On April 25, 2012, ALJ Ilene Sloan held a hearing in Seattle, Washington taking testimony from Plaintiff, and a vocational expert. (AR 30-62.) On May 11, 2012, the ALJ issued a decision finding that Plaintiff was not disabled prior to her DLI. (AR 11-22.) The Appeals Council denied review. (AR 1-5.) Plaintiff timely appealed. The parties agreed to a stipulated remand. (AR 577.) The Appeals Council vacated the ALJ's decision and remanded for further proceedings. (AR 590-92.)

ALJ Sloan conducted a new hearing on July 16, 2014, but heard no additional testimony. (AR 515, 536-40.) On July 24, 2014, the ALJ issued a decision once again finding Plaintiff not disabled before her DLI. (AR 515-528.) This decision is now the final decision of the Commissioner.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. §

Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

405(g).

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found Plaintiff had not engaged in substantial gainful activity since her amended onset date of May 1, 2009, and established her DLI as December 31, 2009. (AR 518.) At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found Plaintiff's cognitive disorder NOS, degenerative arthritis of the left knee, status-post strokes, and epilepsy to be severe impairments. (AR 518.) Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ found that Plaintiff's impairments did not meet or equal the criteria of a listed impairment. (AR 518-20.)

If a claimant's impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity (RFC) and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ found Plaintiff capable of performing medium work with additional limitations: she would need to take seizure precautions including avoiding exposure to moving parts or blade, unprotected heights, large bodies of water, vats, and liquids, and use of motorized vehicle. She would have the ability to understand, remember, and carry out simple one and two-step instructions, involving no more than SVP 2. She can maintain concentration and attention for two hour intervals before requiring a 15 minute break to refocus. She can accept instruction from supervisors and work with co-workers. However, dealing with the general public should not be an essential element

of the task, although incidental contact would not be precluded. (AR 520.) With that assessment, the ALJ found Plaintiff able to unable to perform her past relevant work. (AR 526.)

If a claimant demonstrates an inability to perform past relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant retains the capacity to make an adjustment to work that exists in significant levels in the national economy. Based on testimony from a vocational expert, the ALJ found Plaintiff able to perform the representative occupations of hand packager, small products assembler, and inspector/hand packager. (AR 527.) Therefore, the ALJ found Plaintiff not disabled prior to her DLI of December 31, 2009. (AR 528.)

This Court's review of the ALJ's decision is limited to whether the decision is in accordance with the law and the findings supported by substantial evidence in the record as a whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

Plaintiff argues the ALJ erred by (1) improperly evaluating the opinion of examining physician Dan Phan, M.D., (2) failing to properly determine the onset date of her disability, (3) improperly discounting her opinion, and (4) rejecting lay testimony without germane reasons. Dkt 17-1 at 1. According to Plaintiff, these errors should be remedied by a remand

for payment of benefits, not additional proceedings. Dkt. 17-1 at 18. The Commissioner argues that the ALJ's decision is free of legal error, supported by substantial evidence and should be affirmed. Dkt. 19 at 13.

Medical Evidence

Plaintiff contends that the ALJ failed to properly evaluate the opinion of examining physician Dan V. Phan, M.D. Dr. Phan evaluated Plaintiff in May 2009. (AR 384-86.) In addressing Plaintiff's functional limitations, Dr. Phan stated, "[w]ith the knee problem, she should avoid works requiring prolonged walking, and frequent kneeling and squatting." (AR 386.) In her first decision, the ALJ gave this opinion "great weight" and assessed the RFC at the medium exertion level. (AR 16-17.) The Appeals Council determined that this assessment was problematic:

> The Administrative Law Judge assigned "great weight" to the opinion of Dan V. Phan, M.D. However, the Administrative Law Judge found the claimant capable of performing medium work despite Dr. Phan's opinion that the claimant should avoid prolonged walking due to her left knee impairment. "Medium" exertional work requires standing or walking, off and on, for a total of approximately six hours in an eight-hour workday. (AR 590.)

The Appeals Council directed the ALJ to resolve this inconsistency on remand. (AR 590.)

In her second decision, the ALJ accorded "partial" weight to Dr. Phan's opinion and acknowledged his assessment that Plaintiff needed to avoid prolonged walking. (AR 524.) According to the ALJ, "[w]hile the claimant may not be able to stand and/or walk for an entire 8-hour day, I find that Dr. Phan's examination findings support a conclusion that she could stand and/or walk for 6 hours in an 8-hour workday." (AR 524.) In support of this finding, the ALJ noted that Dr. Phan's examination showed full flexion and extension of the

knee; no redness, swelling, or deformity; full motor strength, normal gait, and no need for an assistive device; Plaintiff could walk about one mile, and denied any limitations on standing. (AR 524.)

The ALJ only gave "partial" weight to Dr. Phan's opinion in this decision, but failed to provide any reason to discount the opinion. This is error. The ALJ must provide "clear and convincing" reasons for rejecting the uncontradicted opinion of a treating physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Even when a treating physician's opinion is contradicted, that opinion "can only be rejected for specific and legitimate reasons that are supported by substantial evidence in the record." *Id*. at 830-31. Here, the ALJ failed to provide any reason for giving only "partial" weight to Dr. Phan's opinion.

Furthermore, the ALJ once again found Plaintiff capable of medium work without reconciling that exertion level with Dr. Phan's opinion. Medium exertion "require[s] the worker to stand or walk most of the time." Social Security Ruling 83-14. The ALJ provides no explanation as to how an opinion that specifically noted the need to avoid "prolonged" walking supports a medium exertional level requiring six hours of walking/standing. SSR 83-10. The Commissioner urges the Court that "because medium work involves alternating between walking and standing 'off and on' for six hours a day, Plaintiff has not shown that it actually requires 'prolonged walking.'" Dkt. 19 at 3. But, the ALJ did not differentiate between standing and walking in the RFC. Without additional limitations, "medium exertion" could include a majority of walking over the course of six hours, which would be inconsistent with Dr. Phan's opinion. Thus, ALJ failed to resolve the inconsistency highlighted by the Appeals Council, and once again established an RFC seemingly at odds with Plaintiff's

assessed capabilities. This results in an RFC that may not properly reflect Plaintiff's true capacity and undermines the ALJ's step five finding that Plaintiff can perform gainful work.

The Commissioner bears the burden at step five to show that Plaintiff can perform gainful work. *Tackett v. Apfel*, 180 F.3d 1094, 1100 (9th Cir. 1999). To meet this burden, the ALJ solicited testimony from a VE through hypothetical questions. *Id*. at 1100-1101, (AR 54-55.) "Hypothetical questions posed to the vocational expert must set out *all* the limitations and restrictions of the particular claimant." *Embrey v. Bowen*, 849 F.3d 418, 422-23 (9th Cir. 1988). When the hypothetical is not supported by the record and does not include all the limitations, the testimony of the VE has no evidentiary value. *Id*. In this case, the VE was posed a hypothetical with medium exertion level. (AR 54-55.) Because the VE identified jobs compatible with this RFC, which may not fully account for Plaintiff's need to avoid prolonged walking, the testimony has no evidentiary value and the case must be reversed.

Onset Date

To receive DIB, a claimant "must prove that she was either permanently disabled or subject to a condition which became so severe as to disable her prior to the date upon which her disability insured status expires." *Johnson v. Shalala*, 60 F.3d 1428, 1432 (9th Cir. 1995). In this case, Plaintiff's DLI was December 31, 2009. (AR 65.) The ALJ found that Plaintiff "retained the cognitive ability to perform simple, 1 to 2-step tasks before December 31, 2009," and she was not disabled prior to her DLI. (AR 526, 528.) Plaintiff alleges legal error because the ALJ failed to call a medical expert to establish her onset date. The Court agrees.

The ALJ relied heavily upon a May 2009 psychological evaluation conducted by Rodger I. Meinz, Ph.D. (AR 525, 376-82.) Dr. Meinz reported that Plaintiff was anxious,

fearful, and embarrassed about her memory problems. (AR 379.) Plaintiff was oriented, but had to look at her referral sheet to remember the day of the month. (AR 379.) She could recall three out of three objects after five minutes; recall six digits forward but only three digits backward; and slowly completed serial threes from 20 by using her fingers to count. (AR 380.) Her memory scores ranged between average, borderline, and extremely low. (AR 380.) These scores "corroborate her self-report" of poor memory since suffering the two strokes. (AR 381.) Dr. Meinz concluded that Plaintiff "might be capable of light bench assembly…where any memory problems could be accommodated by the routine nature of the work. Whether she could perform at a competitive rate at such work is unknown." (AR 382.) The ALJ summarized Dr. Meinz' opinion:

> Dr. Meinz opined in May 2009 that the claimant could retain the ability to absorb and perform simple sets of auditory and visual data. Dr. Meinz added that the claimant might be capable of light bench assembly work, where her memory problem could be accommodated by the routine nature of her work. (AR 525.)

The ALJ accorded this opinion significant weight because Dr. Meinz conducted psychometric and mental status testing in addition to an interview. (AR 525.)

The ALJ accepted Dr. Meinz' opinion over Plaitniff's treating physician, Sam Eggertsen, M.D. Dr. Eggertsen began seeing Plaintiff in November 2009. (AR 489.) He completed a physical evaluation on January 25, 2010 in which he asserted that her main issues were cognitive. (AR 425-28.) He opined that her cognitive deficits are "marked" and rated them as severe. (AR 427.) He arrived at this conclusion based on results showing her unable to remember three objects after three minutes, draw a clock face accurately, and subtract seven from one hundred. (AR 426.) The ALJ gave minimal weight to Dr. Eggertsen's

opinion because he based it on an abridged mental status examination. (AR 525.)

Generally, medical opinions of treating physicians are accorded special weight. *Embrey v. Bowen*, 849 F.2d 418, 421 (9th Cir. 1988). "The ALJ must either accept the opinions of…treating physicians or give specific and legitimate reasons for rejecting them." *Id*. at 422 n.3. Here, the ALJ gave greater weight to Dr. Meinz' opinion, because he conducted significantly more testing and "considered claimant's work history and vocational certifications after her last stroke." (AR 525.) But, Dr. Eggertsen conducted objective testing, in the form of the abbreviated mental status exam, and provided the results. Dr. Eggertsen gave his assessment and specifically noted the objective results that led to his conclusions. (AR 425-28.)

Dr. Eggertsen gave his opinion eight months after Dr. Meinz opined that Plaintiff could possibly perform light bench work, and less than one month after her DLI. (AR 382, 425.) Given the progressive nature of Plaintiff's dementia and the proximity in time to her DLI, Dr. Eggertsen's assessment was the most relevant to her actual functional level at her DLI. The timing of the opinion and the nature of the treating physician relationship give weight to Dr. Eggertsen's assessment.

As a result of the opinions given by Drs. Meinz and Eggertsen, Plaintiff's onset date is unclear. When evidence of the onset of mental impairment is ambiguous, "the ALJ should determine the date based on an informed inference. Such an inference is not possible without the assistance of a medical expert." Morgan v. Sullivan, 945 F.2d 1079, 1082-83 (9th Cir. 1991). Under Social Security Regulation ("SSR") 83-20, determination of an onset date requires a "legitimate medical basis" which is established by calling a medical advisor at the

hearing.

> How long the disease may be determined to have existed at a disabling level of severity depends on an informed judgment of the facts in a particular case. This judgment, however, must have a legitimate medical basis. At a hearing, the administrative law judge (ALJ) should call on the services of a medical advisor when onset must be inferred.

SSR 83-20 has been interpreted to *require* a medical advisor if the "medical evidence is not definite concerning the onset date and medical inferences need to be made." *Delorme v. Sullivan*, 924 F.2d 841, 848 (9th Cir. 1991). In such cases, the ALJ must call a medical expert to assist in determining the onset date. *Armstrong v. Comm'r of Soc. Sec. Admin., 160 F.3d 587, 590 (9th Cir. 1998).*

In this case, the onset date is unclear. In May 2009, Dr. Meinz opined that Plaintiff "might" be capable of light bench assembly, but was unsure if she could perform at a competitive rate. (AR 382.) By January 2010, less than one month after DLI, Plaintiff's treating physician found her to have severe cognitive deficiencies. In a case, such as this, where onset date is ambiguous but critical to the claim, the ALJ was required to call a medical expert to make the necessary medical inferences and establish the onset date. Failure to obtain assistance from a medical expert was legal error. Because onset date is central to the DIB determination, the error in establishing that date was harmful and requires reversal.

Plaintiff's Credibility

The ALJ found that Plaintiff's statements concerning the intensity, persistence, and limiting effects of her symptoms were not entirely credibility. (AR 521.) The ALJ cited the Plaintiff's activities of daily living, work history, and lack of objective medical evidence as

reasons to discount her testimony. (AR 522-23.) Plaintiff contends that the ALJ improperly rejected her testimony.

The ALJ is responsible for determining credibility. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Unless there is affirmative evidence showing that the claimant is malingering, the ALJ must provide clear and convincing reasons for rejecting the evidence. *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). The ALJ "may not discredit the claimant's testimony as to subjective symptoms merely because they are unsupported by objective evidence." *Id*. However, "[in] determining credibility, an ALJ may engage in ordinary techniques of credibility evaluation, such as considering claimant's reputation for truthfulness and inconsistencies in claimant's testimony." *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005). Additionally, the ALJ may consider a claimant's work record and observations of physicians and other third parties regarding the nature, onset, duration, and frequency of symptoms. *Smolen v. Chater*, 80 F.3d 1273, 1285 (9th Cir. 1996).

The ALJ stated that Plaintiff's activities of daily living prior to her DLI are not consistent with her allegations of disability. "[T]he claimant told Dr. Phan and Dr. Meinz that she lived alone and that she was able to independently perform her activities of daily living, including showering daily, preparing her own meals, and keeping her apartment clean." (AR 523.) Plaintiff contends that these activities do not support an adverse credibility determination.

"Daily activities may be grounds for an adverse credibility finding 'if a claimant is able to spend a substantial part of his day engaged in pursuits involving the performance of physical functions that are transferable to a work setting.'" *Orn v. Mastrue*, 495 F.3d 625,

639 (9th Cir. 2007)(citing *Fair v. Bowen*, 885 F.2d 597, 603 (Cir. 9th 1989)). Daily activities may also have bearing on credibility if they are inconsistent with claimed limitations. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). In this case, Plaintiff's ability to perform the basic tasks of showering, preparing her meals, and keeping her house clean is not inconsistent with her knee pain or mental impairments. Nor are these activities transferable to a work setting. *Orn*, 495 F.3d at 639.

Furthermore, the ALJ mischaracterizes Plaintiff's activities of daily living from the period after her DLI. The ALJ found that "claimant's more recent activities suggest that her functioning was likely greater than alleged prior to her date last insured." (AR 523.) The ALJ elaborated:

> she reported living with a disabled friend, whom she helped get dressed and reminded to take medications. She stated that she could care for her personal hygiene and grooming, prepare simple meals, attends appointments, go out alone, take the bus, and shop for groceries. At the hearing she testified that she was able to do her own grocery shopping, but limited her shopping to one store that was close to her home. She testified that she lives alone and is able to care for herself and her apartment. (AR 523.)

But, this description of Plaintiff's ability to care for herself omits several key details. For example, Plaintiff limited her shopping to a single location because she knew how to walk to that store and back and would not get lost. (AR 43.) At the store, she often had difficulty remembering what she needed to purchase, so she would buy "a little bit of everything. Like lots of soups." (AR 43.) She cooked only basic foods using the microwave because she would forget that she had put food in the oven. (AR 41.) And, although Plaintiff took the bus, she would become confused and need to call someone or get assistance from the bus driver. (AR 42.) She would forget which bus she needed or get off at the wrong location. (AR 42.)

As seen by these examples, Plaintiff ability to perform basic activities was hampered by her mental impairment. Her recent functioning does not demonstrate greater capacity prior to her DLI. The ALJ's finding that her ability to accomplish these activities negated her credibility was not supported by substantial evidence in the record.

Similarly, the ALJ's depiction of Plaintiff's prior work history is unsupported by the evidence in the record. The ALJ cited Plaintiff's work history to discredit her testimony.

> [A]fter her second stroke, the claimant was able to return to substantial fanciful activity as a sales person at Sears, where she worked from 1996 through 2002…She later worked at Labor Ready, doing temporary jobs as a flagger and performing pickup and cleanup, from 2006 through 2008. At the hearing, she testified that she was able to follow simple instructions and to perform simple tasks without any issues when she worked at Labor Ready. Her struggles were primarily with performing jobs that required her to follow and perform complex instructions. (AR 523)

But, this description of Plaintiff's work history ignored that Plaintiff had difficulty performing and keeping several jobs. In 2003, she lost her long-time job at Sears automotive because she could not perform her tasks quickly enough, despite trying her hardest. (AR 40.) She was fired from a restaurant hostess position and a retail job because she could not remember important codes. (AR 39-40.) And when performing temporary work with Labor Ready, employers often sent her back because she became disoriented at job sites. (AR 38-39.) "I was just supposed to clean certain rooms before they got into another project of that room, and then I'd get lost in the room trying to get back to the main place we all met. And I'd just be wandering." (AR 39.) Plaintiff testified that she could perform the clean up tasks assigned, but anything more complicated and the employers "would get nervous" and send her back to Labor Ready. (AR 39, 47.) All of these employment struggles occurred prior to

Plaintiff's DLI. Rather than support the ALJ's credibility determination, the record demonstrates significant functional difficulties consistent with Plaintiff's alleged disability.

Finally, the ALJ insinuated that the lack of objective medical evidence undermined Plaintiff's testimony. (AR 521-23.) But, as noted above, the ALJ "may not discredit the claimant's testimony as to subjective symptoms merely because they are unsupported by objective evidence." *Lester*, 81 F.3d at 834. Here, the ALJ's reliance on Plaintiff's activities of daily living and work history is unsupported by the record. The dearth of medical evidence is the only remaining reason to discount Plaintiff's testimony and does not provide legally sufficient reason to discredit Plaintiff. The ALJ failed to provide clear and convincing reasons based on substantial evidence in the record to reject Plaintiff's testimony. Reversal is required.

Lay Witness Testimony

Plaintiff's mother, Margaret Faltys, provided a third party function report in November 2010 that detailed Plaintiff's difficulties. (AR 312-19.) "Descriptions by friends and family members in a position to observe a claimant's symptoms and daily activities have routinely been treated as competent evidence." *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987). A germane reason is required to reject such evidence. *Dodrill v. Shalala*, 12 F.3d

Plaintiff alleges that the ALJ improperly rejected this testimony because Plaintiff had demonstrated a functional ability to work, and Ms. Faltys did not differentiate between Plaintiff's functioning before and after her DLJ. Dkt. 17-1 at 18. However, this argument references the reasoning provided in the first ALJ decision, since vacated by the Appeals Council. (AR 20, 590-92.) Plaintiff's argument is inapplicable to the current decision.

Disposition

This case is rife with harmful errors requiring reversal. Plaintiff asserts that the proper remedy is remand for award of benefits. The Court may remand for an award of benefits where:

> the record has been fully developed and further administrative proceedings would serve no useful purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting evidence, whether claimant testimony or medical opinion; and (3) if the improperly discredited evidence were credited as true, the ALJ would be required to find the claimant disabled on remand.

Garrison v. Colvin, 759 F.3d 995, 1020 (9th Cir. 2014). The Court abuses its discretion by remanding for further proceedings where the record establishes no basis for serious doubt that the claimant is in fact disabled. *Id*. at 1023. However, remand for award of benefits occurs in rare circumstances. *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1099 (9th Cir. 2014).

Although this case has already been remanded once and has been pending for several years, this is not the rare circumstance requiring remand for benefits. The main issue remains whether Plaintiff was disabled prior to her DLI. As discussed earlier, a medical expert is required when "medical evidence is not definite concerning the onset date and medical inferences need to be made." *Delorme*, 924 F.2d at 848. This Court is no more capable than the ALJ of making the required medical inferences necessary to properly establish Plaintiff's onset date.

The case must be remanded for further proceedings. On remand, the ALJ should take medical expert testimony to assist in the establishment of Plaintiff's disability onset date.

Additionally, the ALJ should reconsider Dr. Phan's opinion, give weight to Plaintiff's testimony, further develop the record as necessary, reassess the RFC, and proceed with steps four and five of the sequential evaluation process as needed.

CONCLUSION

For the reasons set forth above, this matter is REVERSED and REMANDED for further proceedings.

DATED this 27th day of July, 2015.

The Honorable Richard A. Jones
United States District Judge